No. 87-730

In The

UNITED STATES SUPREME COURT

October Term 1987

UNITED STATES OF AMERICA, Petitioner

versus

CHRISTINE MEYER, et al., Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

OPPOSITION TO THE GOVERNMENT'S PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDINGS

Petitioner is the United States of America

Pro se respondents are:

Carol Bellin, JoEllen Childers, Judith Hearn, Rita Toll, Mindy Washington, Terri Galvin, Christine Meyer, Theresa Fitzgibbon, Virginia Senders.

Other respondents are:

Norman C. Jimerson, Angela J. O'Keefe, Susan J. Blake, Kitty Fives, Julie L. Sinai, Richard Spener, Lisa Tarver, Maria R. Conners, Jeanne Marie Walsh, Robert G. Coleman, Margret E. DeColigny, Wallie H. Mason, Edward R. Rauber, Mary S. Dailey, Joan E. Whitney, Cheryl L. Hughes, Margret Artego, Renata Eustis, Martin G. Weiner, Dawn M. Cook, Carol J. Chappell, Richard Deyo, Ann Marie Eisenberg, and Kevin Raymond Reilly. Jacob Weinstein, Margret Van Clief, Judith Hand

QUESTIONS PRESENTED

1. Whether it is error for a District Court to presume vindictiveness in a prosecutor's filing of enhanced charges against only those defendants who exercise their right to trial, when after inquiry, the government offers no explanation or justification for filing the enhanced charges.

2. Whether it is an abuse of discretion for a District Court to dismiss an information once it finds the prosecution tainted by vindictiveness.

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STATEMENT OF THE CASE

On April 22, 1985, the Park Police arrested over 200 persons for Demonstrating Without A Permit. Each arrestee was issued a Park Police citation allowing the recipient to fully dispose of the charges by posting and forfeiting $50.00. While many of the defendants sent in the $50.00 assessment in full satisfaction of the charge, others ignored the citation. The respondents in the case before the Court are those defendants who elected to return and demand trial in the District Court. The District Court dismissed the information based on vindictive prosecution when the U. S. Attorney made no effort to explain why additional charges were filed against only those defendants who chose to go to trial.

Arraignments in this case were scheduled to occur on May 14, 1985, but were cancelled due to inadequate notice. Although the arraignments did not occur on May 14, 1985, counsel for defendants met with the U.S. Attorney and representatives of the District Court Clerk's Office and Magistrate Jean Dwyer and devised a floating arraignment schedule. A series of arraignment dates was scheduled throughout May and June of 1985. Each arrestee would be sent special notice of the date set for that defendant's case.

Counsel for Defendants and the U.S. Attorney reviewed and approved the notice to defendants prior to its being sent. The notice advised each of the date for their arraignment in the case and also informed the recipient that the matter could be disposed of by sending in the $50.00 assessment prior to that date. There was no other discussion between defendants and the U.S. Attorney regarding charges or paying the $50.00 other than this notice.

The first arraignments in this case occurred on May 29, 1985. At the arraignment, the government filed a two count information against each defendant who appeared. The charges for these defendants included the original charge of Demonstrating Without a Permit and a second count of Blocking and Obstructing the Sidewalks and Driveways in front of the White House.

Together the two charges exposed each defendant to a maximum penalty of one year in jail and a $1,000 fine, or both.

Arrestees continued to appear for arraignment throughout the summer. Those arrestees who appeared were arraigned on the same two count information. At the same time, the government was accepting $50.00 payments from any arrestee who chose to send it. Defendants who appeared for arraignment, however, were never informed they retained the option to forfeit the $50.00 and terminate the case. This option would later be made available to defendants who had been arraigned on the two charges, but only at a point at which it was illusory.

Prior to trial, defendants filed a written motion for both a jury trial and to dismiss the information because of vindictive prosecution. The defendants argued that the aggregate sentence entitled them to a jury trial even though individually each charge did not. The motion to dismiss was premised on the U.S. Attorney having filed two charges against only those defendants who elected trial in the District Court. On September 6, 1985, the District Court granted the jury trial request and scheduled further argument on the motion to dismiss.

A hearing on the motion took place on September 11, 1985. Immediately prior to the hearing the government moved to dismiss the charge of Blocking and Obstructing in response to the Court granting the defendants a jury trial. Over the defendants' objection, the Court granted the government's motion to dismiss the additional charge.

At the hearing on the motion, defendants argued the government acted vindictively when it filed an additional charge against only those defendants who demanded trial in the District Court. Defendants claimed filing the enhanced charge was in retaliation for their demanding trial rather than paying the $50.00 assessment. Defendants argued four points: 1) the government had no legitimate basis for filing the additional charge, 2) the government was not factually precluded from filing the additional charge earlier, 3) the arrests were not for criminal conduct, per se, but for conduct arising from

exercising First Amendment rights and 4) the government sought to avoid a potentially prolonged trial for relatively minor offenses. Considering the additional charge was only filed against those defendants who returned to demand trial and there was no legitimate explanation for filing additional charges, the filing of additional charges must be considered retaliation for exercising protected constitutional rights to trial.

In response, the government argued the court had no authority to presume vindictiveness in a pretrial setting. Citing United States v. Goodwin, 457 U.S. 368 (1982), and Bordenkircher v. Hayes, 434 U.S. 357 (1978), the government argued its conduct was a legitimate response to the defendants' rejection of a plea offer. The government claimed there could be any one of a number of possible explanations justifying its charging policy, and this possibility of an explanation precluded the Court from making any further inquiry and from finding vindictiveness. Furthermore, the government argued there could be no vindictiveness in this case given the earlier dismissal of the second charge.

The Court rejected the government's arguments. The Court acknowledged that the prosecution generally has wide latitude in making its charging decisions, and that such decisions are generally beyond review. However, the Court reasoned the defendants had raised sufficient questions warranting some inquiry which the government failed to answer. The Court distinguished this case from that of Goodwin, supra claiming the defendants here were engaged in otherwise protected First Amendment activities, whereas the defendant in Goodwin, supra had no protected interest in assaulting a federal police officer. The Court also distinguished this case from a Bordenkircher, supra situation since there were no plea negotiations prior to the government filing the additional charge. Finding the government made no attempt to justify its charging decision or otherwise explain its actions as anything other than retaliation for the defendant's exercise of their trial rights, the Court dismissed the information. In a written opinion dated November

12, 1985, the Court reaffirmed its prior ruling and denied the government's petition for reconsideration.

The government then appealed to the Circuit Court of Appeals raising the same claims previously rejected by the District Court. In a written opinion filed on February 13, 1987, the Court of Appeals affirmed the District Court in all respects.

The Court held that under Goodwin, supra a defendant could succeed on such a claim by establishing actual vindictiveness in one of two ways. A defendant must first establish a minimum showing of a reasonable likelihood of vindictiveness. Once established, the burden would then shift to the government to provide an explanation. If the government convinced the court its explanation was legitimate, no vindictiveness would arise unless the defendant could objectively establish actual vindictiveness by the government. If, on the other hand, the government had no legitimate explanation, the defendant's initial showing would suffice to establish the vindictiveness. In the latter situation, vindictiveness is presumed based on the government's failure to provide an explanation. Based on the unique facts of this case, the Court found actual vindictiveness because the government failed to present any legitimate explanation for filing the additional charge.

The Court reasoned the defendants in this case presented a sufficient showing of a reasonable likelihood of vindictiveness. The Court initially noted four similarities between this case and Goodwin, supra. First, the additional charges were only filed after the defendants demanded trial. Second, the defendants were never advised that enhanced charges might be filed after demanding trial. Third, the defendants were never informed by the prosecutor that enhanced charges would be filed after demanding trial. Lastly, the enhanced charges were in no way connected with any conduct of the defendants subsequent to demanding trial. Noting these similarities, the court refused to base its finding of vindictiveness on these considerations alone.

> These circumstances alone, of course, fail to support a realistic likelihood of prosecutorial vindictiveness; the Supreme Court's ruling in Goodwin held as much. We note them because they combine with other circumstances in the case to suggest a retaliatory motive.

Petition App. A p. 8a.

One factor considered was the filing of additional charges against only defendants who demanded trial. Additional charges were not brought against any other defendants, although all participated in the same demonstration and conducted themselves in the same manner. The disparate treatment of identically situated defendants is a factor not present in Goodwin, supra but present in this case. The panel saw in such disparate treatment a suspicion of discrimination among defendants based on their exercise of the right to trial.

A second consideration was the relative simplicity and straightforward nature of the facts and law of the case. The panel recognized that in most cases, as in Goodwin, supra a prosecutor's initial charging decision is based on an incomplete knowledge of the facts. In this case, the court found those considerations missing. As the panel recognized, "the suspicion must grow that the prosecutor increased the charges not because of any further factual investigation or legal analysis, but because the defendants chose to exercise their constitutional rights." (Petition App. A at 9a) This consideration merely added to the suspicion of a retaliatory motive; it did not compel a finding of a retaliatory motive.

A third consideration was the government's conduct levelled against defendants after filing the additional charge. At the hearing on the motion to dismiss, the government moved to dismiss the additional charge in order to avoid a jury trial. The panel rejected the possibility of a benign explanation for this given the overall context in which it occurred. The panel found in this a "disturbing willingness to toy with the defendants." (Petition App. A at 10a) In his opinion concurring with the order vacating the grant of en banc review, Judge Silberman considered this to be "unseemly prosecutorial maneuvering."

(Petition App.B p.35a) A parallel factor is totally absent in Goodwin, supra and to the panel amounted to only one factor in finding a retaliatory motive.

Lastly, the panel considered the government's motivation to act vindictively. The panel concluded, based on the unique facts of this case, the government had strong motivation to avoid the "courtroom morass" presented by a thirty-plus co-defendant trial involving numerous pro se defendants raising First Amendment and other constitutional defenses. The peculiar aspects presented by such a trial makes the desire to avoid trial even more compelling than the desire to avoid trial present in any other criminal case, Goodwin, supra included.

The panel based its finding of a realistic likelihood of vindictiveness on the combination of these factors viewed in "their entirety" and in view of the government's failure to offer an adequate explanation of its decision, the panel also noted that the unique facts of this case bind the decision to only this case. To the extent the decision binds prosecutors in other cases, it only does so to the extent those prosecutors have no legitimate explanation for changing the charges. Secondly, the panel noted that even if the decision did bind prosecutors, a prosecutor would still be free to offer a legitimate explanation for enhancing the charges. Thirdly, the panel reasoned that there might not even be an appearance of vindictiveness if the arrestees were advised that demanding trial could lead to enhanced charges. Finally, the panel considered the government's predictions of dire consequence for the administration of justice to be greatly exaggerated given the limited application of its decision.

The Court also held that the remedy of dismissal was not an abuse of discretion. The Court noted the decision was limited to the unique facts of this case and considered it necessary to prevent furture occurrences of such government conduct.

The government now presents for a second time the same arguments presented previously in the Court of Appeals. It is in opposition that defendants now respond.

REASONS FOR DENYING THE PETITION

This case presents an application of the vindictive prosecution doctrine in a pretrial setting when the government failed to present any contrary evidence. The narrow ruling of the Court of Appeals, given the unique facts of this case, is a proper application of the doctrine notwithstanding the government's protestations to the contrary and predictions of dire consequences for the administration of justice.

In United State v. Goodwin, 457 U.S. 368 (1982), the Court ruled that a presumption of vindictiveness would not arise in a pretrial setting based merely on the timing of the government's filing of enhanced charges against a defendant. At the same time,the Court also recognized that "a defendant in an appropriate case might prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do". Goodwin, at 384. The District Court and Court of Appeals both found the respondents presented an appropriate case for applying this rule from Goodwin supra, especially in light of the government's failure to present evidence to the contrary.

Chief Judge Aubrey Robinson of the District Court ruled,

> The initial charge, a petty misdemeanor, the minimum possibility of a fine or incarceration suddenly blossoms into the possibility of a $1,000 fine and a year in jail absolutely out of the blue, so to speak, with no additional reasons that could have possibly been conjured up or in fact were offered by the government, although the government is not obligated, necessarily, to tell you its reasons, but there has to be some basis for it which changes the situation.

(Transcript of Proceedings on September 11, 1985, before Chief Judge Aubrey Robinson at pages 48, 49, Government Petition Appendix C at page 53a.)

In affirming this ruling, the Circuit Court of Appeals held,

> The government declined to come forward with any evidence that would erase such a presumption and thus doomed itself to the critical finding.

(Slip opinion in U.S. v. Meyer, et al. at page 6, Government Petition at Appendix A at p.6a.)

The government now argues that the Court of Appeals was

wrong for three reasons. First, the Court improperly applied a presumption of vindictiveness contrary to the holding in Goodwin, supra Secondly, as a matter of fact, the filing of the enhanced charge occurred in the context of plea negotiations, and is therefore not vindictive. Third, the court imposed an improper remedy once it did find vindictiveness.

Each of the government's arguments must fail. First, the Court of Appeals and District Court did not presume vindictiveness. Each court found vindictiveness when the government failed to offer an independent justification for the enhancement. Secondly, there is no basis in the record to consider this a plea bargaining case. Throughout its history, every court reviewing the case found no plea bargaining occurred. To characterize this case as a plea bargaining situation is not only misleading, it is dishonest and warrants no further discussion. Third, the traditional remedy for vindictiveness is dismissal. The doctrine was developed as a prophylactic rule, designed to operate in those unique situations involving the highly unusual occurrence of vindictiveness against a defendant. It may not be the only remedy or the best remedy for every situation, but it is an available remedy to be applied at the trial court's discretion. The government further argues that affirming the decision will emasculate the magistrate citation system, bind prosecutors to all arrest decisions made by police and otherwise prevent the police in the District of Columbia from dealing effectively with mass arrest situations. There is no indication that since September 11, 1985, the magistrate citation has disintegrated or that the police have been unable to effectively handle mass arrest situations in the District of Columbia. The dire predictions the government suggests are merely chimeras of its own creation with no basis in fact or reality.

Vindictive prosecution involves penalizing a defendant for doing what the law plainly allows. It can occur in a sentencing stage through the imposition of a greater sentence on retrial. It can occur in the charging stage by the filing of enhanced

charges in response to a defendant's invoking various procedural rights. A Due Process violation derives not from the action taken against the defendant, but an improper motivation for that action. Discerning motivations is difficult, and to assist in the determination, the Court seeks to discern a possible legitimate explanation that would dispel the appearance of vindictiveness. In those situations where there is no explanation, the Court presumes, "by operation of law, the increases" are vindictive. Wasman v. United States, 468 U.S. 559, 569 (1983)

In North Carolina v. Pearce, 395 U.S. 711 (1969), the imposition of a greater sentence after retrial was prohibited unless supported by objective factors regarding the defendant's conduct. Greater sentences were not barred per se, only those not supported by independent factors. The Court ruled that the Due Process Clause prohibits the imposition of a greater sertence solely in retaliation for exercising appellate rights.

In Blackledge v. Perry, 417 U.S. 21 (1974), the Court held that filing a felony indictment against a defendant for exercising a statutory right to de novo appeal violated the Due Process Clause. The rule of Pearce was extended to prevent the exercise of vindictiveness by a prosecutor.

In Pearce and Perry, there was no evidence in the record that would dispel the appearance of vindictiveness. Where the evidence is in the record, or other factors operate to dispel the appearance, no violation will be found.

In Colten v. Kentucky, 407 U.S 104 (1972), the structure of Kentucky's two tiered system was not unconstitutional simply because it created a possibility of increased punishment on retrial. The Court, however, did recognize that sentencing under that system would involve the same problem if there was evidence of actual vindictiveness. On the facts of Colten, the Court saw no reason to extend the "prophylactic rule" of Pearce, Wasman, supra at 564.

In Chaffin v. Stynchombe, 412 U.S. 17 (1973), the possibility of vindictiveness was found minimal where a jury

imposed sentence, even if on retrial. The intervention of the jury dispelled the possibility of actual vindictiveness by the judge or prosecutor. The Court did recognize that using a jury system to impose sentence after the exercise of a right would be a violation if coupled with other evidence of actual vindictiveness. Id., at 32, n.20., See Wasman, supra at 567.

In Bordenkircher v. Hayes, 434 U.S. 357 (1978), no vindictiveness was found in a prosecutor carrying out a threat made in plea negotiations, provided the threat involved action legally available to the prosecutor. In the plea negotiation context, carrying out threats does not alone rise to a level of vindictiveness without additional proof of actual vindictiveness. Id., at 362, United States v. Goodwin, 457 U.S. at 380, n.12, Wasman, supra, at 568.

In United States v. Goodwin, the rule of Pearce, supra was not extended to a prosecutor filing a felony charge after a demand for a jury trial. The timing of the prosecutor's action, by itself, was not sufficient to establish a presumption of vindictiveness, but was sufficient to to raise the possibility.

The Court reconciled the various precedents from these cases in Wasman v. United States, supra.

> . . . [D]ue process does not in any sense forbid enhanced sentences or charges, but only enhancement motivated by actual vindictiveness toward the defendant for having exercised guaranteed rights. In Pearce and in Blackledge, the Court "presumed" that the increased sentence and charge were the products of actual vindictiveness aroused by the defendants' appeals. It held the defendants' right to due process was violated not because the sentence and charge were enhanced, but because there was no evidence introduced to rebut the presumption that actual vindictiveness was behind the increases; in other words, by operation of law, the increases were deemed motivated by vindictiveness. In Colten, Chaffin, Bordenkircher, and Goodwin, on the other hand -- where the presumption was held not to apply -- we made clear that a due process violation could be established only by proof of actual vindictiveness.
>
> In sum, where the presumption applies, the sentencing authority or the prosecutor must rebut the presumption that an increased sentence or charge resulted from vindictiveness; where the presumption does not apply, the defendant must affirmatively prove actual vindictiveness.

Wasman v. United States, 468 U.S. 559, 568-569 (Opinion by Burger, C.J.)

In Wasman, supra the Court was concerned with a claim of vindictive sentencing for a defendant who received a greater sentence on retrial. "This was sufficient to engage the presumption of Pearce." Id., at 569. The Court however, on the facts of Wasman, found no violation considering the careful record made by the sentencing judge explaining how circumstances changed between both sentencings.

Wasman, Id., found the specter of vindictiveness to arise in any case involving a court imposing an increased sentence on retrial, or the filing of additional charges against the defendant after invoking various rights. The specter dissipates if an independent justification for the enhancement can be shown. Once dissipated, a defendant can only succeed on a vindictiveness claim by proof of actual vindictiveness. If, on the other hand, the specter cannot be dispelled by independent justification, it solidifies into a finding of actual vindictiveness.

Wasman, supra is also significant in affirming of dismissal as an appropriate remedy for cases of vindictive prosecution.

> Because of its "severity," see Goodwin at 373, the Court has been chary about extending the Pearce presumption of vindictiveness when the likelihood of vindictiveness is not as pronounced as in Pearce and Blackledge. This reluctance is understandable for, as we have noted, operation of the presumption often "block[s] a legitimate response to criminal conduct." 457 U.S. at 373.

Wasman, supra, at 566.

The government cites numerous cases against this proposition. Each of these cases deals with a variety of prosecutorial misconduct other than vindictive prosecution. Vindictive prosecution implicates the the fundamental nature of the government's plenary prosecutorial power. There is a great potential for abuse of that power, and no greater abuse exists than retaliation for exercising constitutional rights. Other remedies may be appropriate in other situations. The prospect of dismissal is necessary as a remedy appropriate to the magnitude of harm. United States v. Morrison, 449 U.S. 361 (1981) There can be no tolerance of a prosecutor's attempt to deprive the citizenry of liberty for exercising constitutional rights.

The ruling in this case is wholly fact-bound. It responds to a situation unlikely to recur in the District of Columbia and which has never arisen in any other Circuit. Thus, the Petition for Writ of Certiorari should be denied.

In this case before the Court, the government argues that the Court of Appeals improperly found that the specter of vindictiveness was not dispelled by the government. Whether the specter is dispelled or not is ultimately a factual determination made by the trial court in the first instance. In this case, the trial court found the various considerations identified by the Court of Appeals all converge in the unique facts of this case to establish vindictiveness.

Throughout this case, the government has had every opportunity to present evidence to dispel the appearance of vindictiveness. The government failed to present such evidence. The government did not challenge the District Court's factual determinations supporting the finding of vindictiveness in the Court of Appeals, and is not challenging them now. Each case of vindictive prosecution rests on the particular circumstances of that case, as does the determination in this case. To ask this Court for salvage from a failed litigation strategy is not a sufficiently compelling reason for this Court to substitute its judgment for that of the lower court.

CONCLUSION

The petition for writ of certiorari should be denied. The Court may wish to consider summary affirmance.

Respectfully submitted.

Daniel Ellenbogen

Counsel for Respondents

December 1987